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# No. 7736

IN THE

# United States Circuit Court of Appeals

**For the Ninth Circuit**

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COMMISSIONER OF INTERNAL REVENUE,
*Petitioner,*

vs.

HOPE C. NEAVES,
*Respondent.*

**On Petition for Review of Decision of the United States Board of Tax Appeals.**

## BRIEF FOR RESPONDENT.

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## BRIEF FOR RESPONDENT.

### STATEMENT OF FACTS.

The facts of this case are summarized on pages 2-4 of petitioner's brief, and the statement of evidence (R. 30-33) gives all of the testimony of the taxpayer, who was the only witness, so it would seem unnecessary to state them here again.

### QUESTION PRESENTED.

The real question presented here is not clearly stated by petitioner on page 2 of his brief. While the ultimate question is whether or not the respondent taxpayer is entitled to a deductible loss in selling certain stocks, yet this really depends solely on whether

or not the taxpayer, within thirty days before or after said sale, had any contract or option to acquire substantially identical stocks. (See Revenue Act of 1928, Sec. 118, Petitioner's Brief, page 12.) If the taxpayer had no such contract to acquire identical stocks within thirty days before or after said sale, she is obviously entitled to the loss deduction.

It happens that the taxpayer here acquired similar stocks some *five months* later, after her sale, and therefore, the *sole* question raised by the Commissioner in denying her a deductible loss was her *bona fide* in making the sale. (See R. 10, 24, and Petitioner's Brief, page 4.)

The answer to the entire question here is readily found in the taxpayer's uncontradicted testimony as follows: "I did not have any understanding that I was going to buy the stock back at a later date." (R. 32 and see also R. 16 and Petitioner's Brief, page 3.)

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**SPECIFICATION OF ERRORS.**

Altho petitioner, on page 4 of his brief, specifies five alleged errors of the Board of Tax Appeals in allowing the taxpayer to deduct her loss, it seems apparent that petitioner on this appeal is relying only on number 2, which claims that the sale was not *bona fide,* and number 3, which claims that the taxpayer's evidence was insufficient to overcome the *prima facie* presumption in favor of the Commissioner's determination.

The petitioner refers to several other assignments of error (R. 25-26) dealing with the original cost of the stocks, but since this question was never really in issue, as plainly appears from the Commissioner's letter denying the deduction (R. 10), and the opinion of the Board. (R. 16.) Also, inasmuch as petitioner plainly admits the cost in his statement near the top of page 3 of his brief, it would seem unnecessary to go into this point at all. The findings of the Board (R. 15) show plainly what the cost was, because the cost was never questioned but was admitted by the Commissioner during the hearing, as satisfactory evidence had been presented to him prior thereto.

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**SUMMARY OF PETITIONER'S ARGUMENT AND STATEMENT OF RESPONDENT'S POSITION.**

Petitioner argues that a *prima facie* presumption existed as to the correctness of the Commissioner's determination. Respondent's answer to this is simply that whatever presumption existed has been fully overcome by the taxpayer's direct and uncontradicted testimony. It should be noted that *prima facie* presumption does not mean *conclusive* presumption.

Petitioner further argues that respondent taxpayer had the burden of proof in claiming a deduction. Respondent's answer to this is simply that she not only sustained the burden of proof, but offered *all of the proof without the slightest contradiction.* The taxpayer was the only witness before the Board.

In endeavoring to show that the taxpayer did not sustain the burden of proof, petitioner alleges:

1. That the transaction was entirely intra-family;

2. That the taxpayer did not call her father and brother as corroborating witnesses; and

3. That the taxpayer does not show any reason for the sale and subsequent repurchase.

While each of the above points can and will be answered, it is the respondent's contention that inasmuch as the Commissioner is questioning the *bona fide* of the taxpayer in making the sale, he is charging her with fraudulent intent to evade a tax and, therefore, the burden of proof shifts to him under Revenue Act of 1928, Sec. 601. (See page 6 herein.)

The final answer to all of petitioner's points is that he is seeking a review here solely upon a question of fact, and the Circuit Court and Supreme Court have repeatedly held that the Board of Tax Appeals' decision on a question of fact, if supported by any substantial evidence, will not be disturbed on appeal.

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## ARGUMENT.

### A. PRIMA FACIE PRESUMPTION IN FAVOR OF COMMISSIONER.

Petitioner cites numerous cases holding that a *prima facie* presumption exists in favor of the Commissioner's determination. However, this presump-

tion is merely *prima facie* and not *conclusive,* and any substantial evidence is sufficient to overcome a *prima facie* presumption. It is submitted that the taxpayer's direct and uncontradicted testimony to the effect that "there was no agreement or understanding between taxpayer and any other person that she could or would purchase said stock or any part thereof" (Petitioner's Brief, page 3; see also R. 32) is amply sufficient to overcome any *prima facie* presumption here.

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B. BURDEN OF PROOF. FRAUD.

Petitioner lays great stress on his contention that the burden of proof to show that the sale of the stocks by taxpayer was *bona fide* is upon her. Conceding (for the moment only) that this is true, how can it be said that the burden of proof was not sustained by the taxpayer when she testified directly that at the time of the sale she had no agreement to repurchase, and her testimony was not refuted in the slightest degree, although she was fully cross-examined by the Commissioner's counsel?

However, petitioner is mistaken about the burden of proof being upon the taxpayer. He is questioning the taxpayer's *bona fide* and claiming *fraud* on her part in evading taxes and, therefore, the burden of proof shifts to him as the statute and authorities below indicate.

*Wishon Watson Co. v. Commissioner,* 66 F. (2d) 52 (C. C. A. 9) (1933), states on page 54:

> "Revenue Act of 1928, Sec. 601, 45 Stat. 872 (26 U.S.C.A. Sec. 1219), is as follows: 'In any proceeding involving the issue whether the petitioner has been guilty of fraud with intent to evade tax, where no hearing has been held before the enactment of the Revenue Act of 1928, the burden of proof in respect of such issue shall be upon the Commissioner.' " (Citing cases.)

The above case cites *Budd v. Commissioner,* 43 F. (2d) 509 (C. C. A. 3), which reversed the Board of Tax Appeals because it decided that the burden to show no fraud was upon the taxpayer. On page 512, the Court said:

> "There must be something more than mere suspicion. * * * It is a general principle that fraud is never to be presumed, and he who avers it, takes upon himself the burden of proving it * * * *fraud cannot be inferred by the Court or jury from acts, legal in themselves and consistent with an honest purpose."* (Italics supplied.)

Also in *Marshall v. Commissioner,* 57 F. (2d) 633 (C. C. A. 6) (1932), the Court said on page 634:

> "There was nothing unlawful, or even mildly unethical, in the motive of petitioner, to avoid some portion of the burden of taxation. There is nothing illegal in the gift of shares of stock by a husband to his wife. If the transfer were attacked as fraudulent, the burden would be upon the Commissioner to establish such fraud by a clear preponderance of the evidence. Tappan et al. v. Commissioner, 41 F. (2d) 454 (C. C. A. 6); Budd v. Commissioner, 43 F. (2d) 509 (C. C. A. 3.)"

In view of the above it would seem idle to make further answer to petitioner's contentions about the burden of proof. However, a brief reply will be made to show they are without any merit.

1. INTRA-FAMILY SALE.

Petitioner is suspicious because the sale of stock by taxpayer was made to her father. Suspicion is never proof of fraud (*Budd v. Commissioner,* supra), and here the suspicion is even groundless, because there is no evidence whatever to justify it. Sales of stock between members of a family have been repeatedly held to be proper in claiming a deductible loss, as long as the seller divests himself of all title and has no understanding within thirty days before or after the sale to repurchase.

Sales between husband and wife have been upheld in allowing loss deductions on income tax in the following cases:

*Peters v. Commissioner,* 28 B. T. A. 976 (1933);

*Burton v. Commissioner,* 28 B. T. A. 1242 (1933);

*Gummey v. Commissioner,* 27 B. T. A. 1158 (1933);

*Uihlein v. Commissioner,* 30 B. T. A. 399.

Sales between brothers have been similarly upheld in the following cases:

*Griffin v. Commissioner,* 7 B. T. A. 1094;

*Kurtz v. Commissioner,* 8 B. T. A. 679;

*Larsh v. Commissioner,* 6 B. T. A. 1086.

A sale between parent and child was similarly upheld in the case of

*Frank v. Commissioner,* 27 B. T. A. 1158 (1933).

A sale between law partners was similarly upheld in the case of

*Britain v. Commissioner,* 20 B. T. A. 127.

In many of the above cases the seller repurchased the same stock some short time later, but this did not affect the *bona fide* of the original sale.

Each of the cases cited by petitioner on page 7 of his brief can be readily distinguished from the facts of the present case. For example, in the case of *Slayton v. Commissioner,* the husband acted as agent of his wife in selling and arranging a repurchase of the stock by their son within two weeks after the sale. In *Fouke v. Commissioner* there was an instantaneous redelivery of stock by the wife to the husband and other circumstances showing no *bona fide.* In *Schlossberg v. Commissioner,* 2 B. T. A. 683, the Board said on page 686:

> "* * * evidence adduced by taxpayer * * * is conflicting and unconvincing * * *"

Similar distinctions appear in all the other cases cited by petitioner and obviously they cannot apply here.

A possible hint as to why the Commissioner has suspected this sale by the taxpayer to her father and why this appeal has been taken may be gathered from the erroneous statement in the Commissioner's letter

(R. 9), where he states: "It is shown that your *father* had power of attorney * * *" (Italics supplied.) It is the *brother* who had the power of attorney. (R. 31-32.)

2. CORROBORATING WITNESSES NOT CALLED.

Petitioner indulges in further suspicion because the taxpayer alone testified and she did not call her brother or her father. The taxpayer lived in Beverly Hills, California, and the hearing before the Board was held at Long Beach, California. Her brother and father reside in Providence, Rhode Island. (R. 31-32.) The amount involved here is but $1200.00. It would have meant considerable expense for her brother and father to make a round trip from one end of the continent to the other.

Besides, does the taxpayer have to assume that her direct and fully uncontradicted statements under oath are not entitled to any credence? Her testimony was the *best evidence* which could be offered as she knew better than anyone else whether or not she contracted to repurchase the stock when she made the sale. The testimony of her brother and father would be merely *corroborative* of the fact that the sale was a completed transaction. The sum of $6735.00, which was the fair market value of the stocks, was paid by the father to the taxpayer and the cancelled check was offered in evidence. (R. 31.) Where is there any evidence to the contrary? The petitioner is indulging in wild speculations and assumptions of fraudulent intent without any evidence to substantiate them.

Furthermore, there was no demand made by the Commissioner before the Board that her brother and father be called and the question is raised here on appeal for the first time. Therefore, under the well established rules, this point should not be even considered here.

3. MOTIVE FOR SALE.

Continuing his suspicious attitude, petitioner contends there is no reason shown for the sale and subsequent repurchase. At the bottom of page 7 of petitioner's brief he quotes the taxpayer's testimony from R. 31-32 as follows: "He did not explain the reason for the advisability of the sale."

However, he carefully omits the sentence which immediately follows: "He thought it would be better business for me to sell it, and I told him to sell it."

The motive for the sale was apparently to secure a tax reduction and the taxpayer's legal right to do this cannot be questioned, as will be shown.

On page 9 of petitioner's brief he cites *Shoenberg v. Commissioner,* 77 F. (2d) 446, and quotes from page 449. However, he was very careful to omit the following, which also appears on page 449:

> "It is immaterial that the motive prompting the sale or the plan of which the sale was a part was to secure a deduction * * *
>
> Two very recent cases, *Commissioner v. Dyer,* 74 F. (2d) 685, and *Marston v. Commissioner,* 75 F. (2d) 936, in the Second Circuit, taken together, reveal the rule as to sales and repurchases. In the Dyer case there were sales and

repurchases, both parts of an original entire plan, and the claimed deductions were denied. In the Marston case there was a sale with no intention or plan to repurchase, but there was a later repurchase, and the claimed deduction on account of the sale was allowed."

In *Commissioner v. Dyer*, 74 F. (2d) 685 (C. C. A. 2) (1935), which is referred to above, the Court said on page 686:

> "It is undoubtedly true that the motive inducing Mr. Dyer and his associates to 'sell and deliver' their stock to Elanco was to reduce taxes by claiming losses on the sales. This, however, despite the appellants' argument to the contrary, is not enough to condemn the transactions. Anyone is privileged to arrange his affairs so that his taxes shall be as low as the statute permits. *Helvering v. Gregory*, 69 F. (2d) 809, 810 (C. C. A. 2), affirmed 55 S. Ct. 266, 293 U. S. 465, Jan. 7, 1935 * * * (Citing further cases.)"

In *Gregory v. Helvering*, 293 U. S. 465 (1934), which is referred to above, the Court said on page 469:

> "The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means of which the law permits, cannot be doubted. (Citing cases.)"

The above should put an end to the unwarranted suspicions of the Commissioner as the taxpayer here was apparently doing only what she had a clear legal right to do.

The opinion of the Board (R. 17) cites *Commissioner v. Hale,* 67 F. (2d) 561, 563, which similarly holds that a sale for the purpose of securing a tax reduction is valid where the sale is *bona fide* and cites *Wiggin v. Commissioner,* 46 F. (2d) 743, 745-6, and *Bullen v. State of Wisconsin,* 240 U. S. 625.

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### C. FINDINGS OF BOARD NOT REVIEWABLE ON APPEAL.

#### 1. ANY SUBSTANTIAL EVIDENCE SUFFICIENT TO AFFIRM BOARD.

It has been repeatedly held that the findings of fact of the Board of Tax Appeals will not be disturbed on appeal if there is any substantial evidence to support them. Here the findings of the Board clearly and definitely show the *bona fide* of the taxpayer. (R. 15-18.)

In *Commissioner v. Gerard,* 75 F. (2d) 542 (C. C. A. 9) (1935), this Court said on page 544:

> "* * * if the findings of the Board are supported by any substantial evidence, they are conclusive and will not be disturbed. Phillips v. Commissioner, 283 U. S. 589, 599 * * * (Citing other cases.)"

Other cases along the same line are:

*First Seattle National Bank v. Commissioner,* 77 F. (2d) 45 (C. C. A. 9) (1935);

*Gordon v. Commissioner,* 75 F. (2d) 429 (C. C. A. 9) (1935);

*Helvering v. Rankin,* 55 S. Crt. 732 (Apr. 1935);

*Slayton v. Commissioner,* 76 F. (2d) 497, 498 (C. C. A. 1) (1935).

2. UNCONTRADICTED EVIDENCE WILL NOT BE REVIEWED.

In *Randolph v. Commissioner,* 76 F. (2d) 472 (C. C. A. 8) (1935), the Court said on page 476:

> "And even though the evidence before the Board is undisputed, the finding of the Board will not be disturbed by this court if different inferences may be reasonably drawn from such evidence. *Helvering v. Ames* (C. C. A. 8) 71 F. (2d) 939, 943."

Other cases in full accord with the above are:

*Wilson v. Commissioner,* 76 F. (2d) 476, 478 (C. C. A. 10) (1935);

*Brown v. Commissioner,* 74 F. (2d) 281, 282 (C. C. A. 10) (1934).

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## CONCLUSION.

The evidence clearly shows a *bona fide* sale by the taxpayer, apparently prompted by the legal motive to reduce her taxes. Furthermore, the petitioner fully cross-examined the taxpayer at the hearing before the Board and *offered no evidence or any objections whatever,* and on this appeal cannot now question the findings of the Board of Tax Appeals.

As regards the burden of proof, it was sustained by the taxpayer even though it was really upon petitioner, since he was claiming fraud.

It is submitted that the Board's decision should be affirmed.

Dated, San Francisco,
November 8, 1935.

Respectfully submitted,
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*Attorney for Respondent.*